Supreme Court, U.S.
FILED

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IN THE

SUPREME COURT OF THE UNITED STATES

SUE WALSTON,

Petitioner

v.

DAVID L. LOCKHART and REBECCA G. LOCKHART

Respondents

On Petition for Writ of Certiorari To
The Court of Appeals For The Tenth District of Texas
At Waco, Texas

PETITION FOR WRIT OF CERTIORARI

SUE WALSTON
Petitioner
3231 Ferndale Drive
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QUESTION PRESENTED FOR REVIEW

Whether laws of the State of Texas that allow for election to judicial seats at every level of the judiciary, supported by campaign contributions solicited by judicial candidates and judicial officeholders from parties who have an interest in proceedings before the court, violate a litigant's Due Process rights to trial by an impartial and disinterested tribunal.

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PETITION FOR WRIT OF CERTIORARI

Sue Walston petitions for a writ of certiorari to review the judgment of the State Court of Appeals for the Tenth District of Texas.

OPINIONS BELOW

The opinion of the Court of Appeals for the Tenth District of Texas is reported as *Walston v. Lockhart*, 62 S.W.3d 257 (Tex.App.–Waco 2002). The denial of Petitioner's Motion for Rehearing on her Petition for Review in the Texas Supreme Court (Appendix at 24) is unreported.

STATEMENT OF JURISDICTION

The judgment and opinion of the Court of Appeals for the Tenth District of Texas was issued on November 14, 2001 and Petitioner's Motion for Rehearing was denied with dissent on January 2, 2002.

The Texas Supreme Court denied a Petition for Review on May 23, 2002 and denied Petitioner's Motion for Rehearing on July 11, 2002.

This Court has jurisdiction to review the appellate court decision on a writ of certiorari pursuant to 28 U.S.C. § 1257.

STATEMENT OF NOTIFICATION

Where this petition draws into question the constitutionality of the laws of the State of Texas and 28 U.S.C. § 2403(b) may apply, Petitioner has served the

Attorney General of Texas in compliance with Rule 29.4(c)

CONSTITUTIONAL PROVISION INVOLVED

Section 1 of the Fourteenth Amendment to the UNITED STATES CONSTITUTION provides:

"All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

STATEMENT OF THE CASE

I. Proceedings Below

Petitioner Sue Walston and her ex-husband were divorced in 1994. Petitioner appealed the division of property set out in the divorce decree and, during the pendency of that appeal, her ex-husband filed a separate partition suit requesting that the court appoint a receiver to sell the parties' marital home. Petitioner filed an interlocutory appeal of the appointment of the receiver which was consolidated with her appeal of the property division. The division of property was reversed on appeal but, because the home was sold and the receiver discharged prior to the appellate court ruling on the consolidated appeals, the appeal of the

appointment of the receiver was dismissed as moot. The appellate court denied several motions for injunctive relief filed by Petitoner to stay the sale of her home pending the outcome of her consolidated appeals.

In 1999 Petitioner filed a suit in trespass to try title against David L. Lockhart and Rebecca G. Lockhart (hereinafter "Respondents"), who purchased the property from the receiver in 1995, alleging that the sale of her home was void because the receiver had exceeded his authority by selling the property after the order of sale expired.

The trial court denied Petitioner's motion for summary judgment and granted summary judgment for Respondents without stating grounds for the decision. The three-member panel of the Court of Appeals for the Tenth District of Texas (hereinafter "Tenth Court of Appeals") found *sua sponte* in an opinion designated "Do not publish" that the appeal should be dismissed because Petitioner lacked standing to complain of any action of the receiver once the receivership was closed. (Appendix at 2). Petitioner's motion for rehearing was denied but, on that motion, one justice filed a published dissent from the opinion of the majority and the majority opinion was re-designated "Publish". (Appendix at 7, 8 & 9). Petitioner petitioned for discretionary review in the Texas Supreme Court and, after requesting and receiving a response, the court denied the petition.

After her petition for review was denied, Petitioner discovered that the two appellate court justices who

voted to dismiss her appeal had accepted campaign contributions and officeholder contributions from the court-appointed receiver Jim Stewart and from the law firm of Sheehy, Lovelace and Mayfield and the individual partners of that law firm who had owned the title company that closed the 1995 sale of the property and had profited from that sale and who stood to lose if the sale were reversed. Petitioner complained in a motion for rehearing (Appendix at 36) that the majority opinion appeared to be tainted by improper consideration of the interest that these contributors might have in the outcome of the case. The Texas Supreme Court denied the motion for rehearing. (Appendix at 25).

II. Reason for Granting the Petition

This case presents an important and recurring constitutional question about the Due Process rights of civil and criminal litigants in Texas and other states in which judges stand for election supported by contributions from interested parties.

The laws that the State of Texas has enacted and enforces which allow judicial candidates and judicial officeholders to solicit and accept contributions from parties who may have an interest in proceedings before the court on which the candidates or officeholders will sit are in violation of Petitioner's rights under the Due Process Clause of the Fourteenth Amendment to the UNITED STATES CONSTITUTION where such laws force non-contributing litigants to bring their cases before

judges whose decisions may be tainted, or may appear to be tainted, by consideration of the contributing party's interest in the outcome of the case.

Article Five of the TEXAS CONSTITUTION provides that judges at all levels of the state judiciary be elected by qualified voters of the state.[1]

TEXAS ELECTION CODE § 251.001 allows for acceptance of contributions for financing of election campaigns and support of officeholders, sets out contribution and expenditure limits, and defines the following:

> "Campaign contribution means a contribution to a candidate or political committee that is offered or given with the intent that it be used in connection with a campaign for elective

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[1] The TEXAS CONSTITUTION, Article V § 2(c):

"Said Justices [Supreme Court] shall be elected (three of them each two years) by the qualified voters of the state at a general election; shall hold their offices six years; and shall each receive such compensation as shall be provided by law."

TEXAS CONSTITUTION, Article V § 6(b):

"Each of said Courts of Appeals shall hold its sessions at a place in its district to be designated by the Legislature, and at such time as may be prescribed by law. Said Justices shall be elected by the qualified voters of their respective districts at a general election, for a term of six years and shall receive for their services the sum provided by law."

TEXAS CONSTITUTION, Article V § 7, 15, and 18(a) are not recited here, but provide for general election of district court judges, county court judges, justices of the peace and constables.

office or on a measure. Whether a contribution is made before, during, or after an election does not affect its status as a campaign contribution."

"Officeholder contribution means a contribution to an officeholder or political committee that is offered or given with the intent that it be used to defray expenses that:

(A) are incurred by the officeholder in performing a duty or engaging in an activity in connection with the office; and

(B) are not reimbursable with public money."

"Officeholder expenditure means an expenditure made by any person to defray expenses that:

(A) are incurred by an officeholder in performing a duty or engaging in an activity in connection with the office; and

(B) are not reimbursable with public money."

Judicial candidates and judicial officeholders are required to file with the Texas Ethics Commission periodic disclosure reports for the purpose of informing the public of how much and from whom contributions are accepted and how those contributions are expended.[2]

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[2] Available from the year 2000 forward at http://www.ethics.state.tx.us/whatsnew/srchinfo.

Mandatory disclosure reports on file with the commission indicate that Chief Justice Davis of the Tenth Court of Appeals has regularly accepted contributions from the court-appointed receiver and from the law firm and partners who profited from the 1995 sale of Petitioner's property and who stand to lose if the sale is reversed.[3] In non-election years and election years in which he ran unopposed, Justice Davis has expended contributions for expensive repairs to a work truck, insurance and taxes on that truck, patronage of the local symphony society, travel, bar association dues, and membership fees in the local chamber of commerce. The Texas Ethics Commission requires that disclosure reports be filed electronically to facilitate public access through the commission's internet site; however, if an officeholder chooses to not maintain records using a computer, that officeholder may file an exemption request with the commission and file disclosure reports in the form of paper copies which are maintained at the Austin, Texas offices of the commission. Although Justice Davis lists among his expenditures the cost of a computer and computer classes, he maintains on file with the commission an exemption request. Access to these records is inconvenient and expensive.

Justice Vance of the Tenth Court of Appeals has regularly accepted contributions from the law firm and partners who profited from the 1995 sale of Petitioner's property and who may stand to lose if the sale is

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[3] Because of format restrictions, Chief Justice Davis' disclosure filings are not included as exhibits in this petition, but are available upon request.

reversed.[4] In fact, Justice Vance was apparently accepting contributions from Sheehy, Lovelace and Mayfield partners and associates while he sat on the 1995 appellate panel that denied Petitioner's repeated requests for injunctive relief to stay the sale of her home pending the outcome of the consolidated appeals. The 1995 appeal of the appointment of the receiver to partition property pursuant to a division later reversed was dismissed by the appellate court as moot because the court delayed ruling until after the home was sold and the receiver discharged.

Chief Justice Davis and Justice Vance make up the majority that voted to dismiss Petitioner's current appeal and there is no question that the votes of these two justices who accepted contributions from parties with an interest in the outcome of this case were decisive in the court's ruling. Justice Gray, the third member of the appellate court panel, whose published dissent from the majority opinion favors Petitioner's legal position, does not appear to have accepted contributions from anyone associated with the case.

Disclosure reports filed with the Texas Ethics Commission indicate that Texas Supreme Court justices expend tens of thousands of dollars in non-election years to defray such expenses as travel, both in-state and out, domestic and foreign, for judges and spouses; newspaper subscriptions; cell phones; long-distance telephone charges; tickets and travel to presidential

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[4] Justice Vance's disclosure filings from the year 2000, forward are available from the Ethics Commission website. Filings prior to 2000 are available upon request.

inaugural events; local charity ball tickets; various club and professional organization dues; court staff lunches, dinners and parties; charitable donations; political contributions; and expensive gifts to undisclosed recipients.

Giving Texas judges the benefit of every doubt, and assuming that all of the expenditures disclosed fall strictly within the scope of the TEXAS ELECTION CODE definition of expenses that are incurred by judges in performing their duty or engaging in an activity in connection with the office, these expenditures are not reimbursable with public money. Therefore, if contributions, including contributions from interested parties, were not available, Texas judges would have to pay for tickets and travel to presidential inaugural events from their own pockets or forgo the adventure; pay bar association dues – local, state and national – from their own pockets and economize elsewhere; pay for newspaper subscriptions from their own pockets or go to the local library to read the daily papers for free; buy charity ball tickets from their own pockets or forgo the enjoyment; pay from their own pockets any travel expenses to those events and for those purposes which are not related directly enough to performance of their duty to be reimbursable by the State or forgo the opportunity; pay for their spouse's travel from their own pockets or leave them at home and suffer the consequences; pay for their own cell phones or forgo the convenience; pay for work truck repairs from their own pockets or cadge a ride to work; and pay social club dues and fees from their own pockets or forgo membership privileges. Any argument that a Texas

judicial officeholder's interest in securing and retaining as much in contributions from as many contributors as possible is not a direct, personal, substantial and pecuniary interest must fail in the face of such evidence to the contrary.

Only those candidate and officeholder disclosure reports filed electronically from the year 2000 forward are readily accessible to the public. Accessing reports filed prior to 2000 or reports filed by officeholders who are exempt from electronic filing is extraordinarily inconvenient and expensive. The necessity of research into the source of funds used by judicial officeholders to obtain their offices and to enhance their lifestyles would impose an unreasonable burden on litigants who have a constitutional right to appear in court with the presumption that they will be heard by an impartial tribunal. *Porter v. Singletary*, 49 F.3d 1483, 1489 (11th Cir. 1995).

But that unreasonable burden is not necessarily imposed on Texas litigants, because any research which discloses information that might lead to suspicion that judges before whom the litigant appears have accepted contributions from parties interested in the outcome of the case serves absolutely no purpose. As Petitioner pointed out to the Texas Supreme Court in her motion for rehearing (Appendix at 36), even if she had discovered prior to the appellate court ruling on her appeal that Chief Justice Davis and Justice Vance regularly accept contributions from parties who have an interest in the outcome of her case, in Texas acceptance of campaign and officeholder contributions

from parties with an interest in a case is not cause for recusal or disqualification. *Apex Towing Co. v. Tolin*, 997 S.W.2d 903, 907 (Tex. 1999) (no recusal required where judge received "substantial political donations from counsel and from one of the parties"); *Aguilar v. Anderson*, 855 S.W.2d 799, 802 (Tex.App.–El Paso 1993, *denied*) (judge solicited and lawyer contributed while case was pending, but recusal not required); *J-IV Invs. v. David Lynn Mach., Inc.*, 784 S.W.2d 106, 107 (Tex.App.–Dallas 1990, *n.w.h.*) (no recusal where lawyer contributed to judge after verdict but before decision on motion for judgment n.o.v.); *Texaco, Inc. v. Pennzoil, Co.*, 729 S.W.2d 768, 843 (Tex. App.–Houston[1st Dis.] 1987, *refused n.r.e.*) (no recusal although plaintiff's counsel contributed $10,000 to trial judge soon after filing lawsuit); *River Road Neighborhood Ass'n v. South Texas Sports, Inc.*, 673 S.W.2d 952, 953 (Tex.App.–San Antonio 1984, *n.w.h.*) (recusal denied although 21.7% of total campaign contributions of one appellate justice came from appellee's lawyer and 17.1% of contributions to another justice came from appellee); *Williams v. Viswanathan* 65 S.W.3d 685, 689 (Tex.App.–Amarillo 2001, *n.w.h.*) (no recusal although appellee's counsel made contributions to justice); *Degarmo v. State*, 922 S.W.2d 256, 267 (Tex.App.–Houston [14th Dist.] 1996, *writ refused*) (recusal not required where judge in criminal trial accepted campaign contribution from victim's family).

In *Rogers v. Bradley*, Texas Supreme Court Justice Enoch attempts to justify limitation of the scope of rules addressing recusal and disqualification by insisting that Texans know that judges must accept contributions to

secure their elected seats and that any reasonable Texan should know that contributions are given with the expectation of consideration of the interests of contributors by elected officials. *Rogers v. Bradley*, 909 S.W.2d 872, 883 (Tex. 1995). Justice Enoch goes on to express his opinion that, "As long as judges are subject to any electoral process, our rules must be construed to encourage citizen involvement, not to chill it." *Id.* at 883.

Surveys sponsored by the Texas Supreme Court found that 83 percent of Texas adults, 69 percent of court personnel, 79 percent of Texas lawyers and 48 percent of Texas judges believe that campaign contributions impacted judicial decisions "very" or "fairly" significantly.[5]

One study comparing contributions by attorneys and law firms to Texas Supreme Court justices and the Texas Supreme Court's rate of granting petitions for discretionary review between 1994 and 1998 indicated a strong correlation between contributions and judicial decisions. The average petition-acceptance rate is 11 percent, but the rate increased to 56 percent for petitioners who contributed more than $250,000. The

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[5] See SUPREME COURT OF TEXAS, STATE BAR OF TEXAS AND TEXAS OFFICE OF COURT ADMINISTRATION, PUBLIC CONFIDENCE IN TEXAS COURTS: A SUMMARY REPORT (December 1998) and THE COURTS AND THE LEGAL PROFESSION IN TEXAS: THE INSIDER'S PERSPECTIVE (August 1999).

Available at: http://courts.state.tx.us/publicinfo/reports.asp

acceptance rate for non-contributors was 5.5 percent.[6] It appears that, as a non-contributor, Petitioner had less than one-tenth the chance of having the merits of her petition for review or her motion for rehearing considered by the Texas Supreme Court as that of a litigant-contributor with sufficient funds to reward the court for its attention.

At a September 2002, conference sponsored by the Research and Policy Committee of the Committee for Economic Development, announcing publication of its report *Justice for Hire: Improving Judicial Selection,* Mark Lanier a Houston attorney and a trustee of the committee, was introduced as someone who characterizes the Texas justice system as "juke box justice". You put your quarter in, you make your selection, and your judge sings your tune. In its report, the committee concluded that:

> "An effective judiciary depends on perceptions of its fairness and neutrality. To the extent that members of the public perceive the court to be influenced by campaign contributions, public confidence in the judiciary is eroded. The current system yields perceptions of corruption or undue influence that need to be addressed if the judiciary is to fulfill its purpose in our democratic society."[7]

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[6] See TEXANS FOR PUBLIC JUSTICE, PAY TO PLAY (2001). Available at http://www.tpj.org/reports/paytoplay/

[7] See JUSTICE FOR HIRE: IMPROVING JUDICIAL SELECTION. ISBN 0-87186-146-1, 2002, page 24. The Research and Policy

A fair trial before an impartial tribunal is a basic requirement of due process and our system of law endeavors to prevent even the probability of unfairness. *In re Murchison*, 349 U.S. 133, 136 (1955). This Court has found that the requirement of neutrality "preserves both the appearance and reality of fairness" by "ensuring that no person will be deprived of his interests in the absence of a proceeding in which he may present his case with assurance that the arbiter is not predisposed to find against him". *Marshall v. Jerrico, Inc.*, 446 U.S. 238, 242 (1979). The Court has further determined that "every procedure which would offer a possible temptation to the average man as a judge . . . not to hold the balance nice, clear and true" denies due process of law. *Tumey v. Ohio*, 273 U.S. 510, 532 (1926). Justice must satisfy the appearance of justice but, so long as the lifestyles and the livelihood of Texas judges, including Texas Supreme Court justices, depends on their ability to attract campaign contributors who have an interest in cases before the courts, justice will continue to appear to be, and probably will be, for sale in Texas. Where Texas judges have a financial interest in the outcome of any case which involves the interest of a contributor, and apparently little or no interest in the outcome of any case which does not involve the interest of a contributor, the probability of actual bias on the part of the judges is too high to be constitutionally tolerable. *Withrow v. Larkin*, 421 U.S. 35, 47 (1975).

Committee of the Committee for Economic Development. Available at www.ced.org.

As soon as she became aware of the facts which led to her concern, Petitioner raised the issue of the possibility of improper interest of appellate court justices by way of the only procedure available to her under the TEXAS RULES OF CIVIL PROCEDURE and the TEXAS RULES OF APPELLATE PROCEDURE, both of which are promulgated by the state supreme court in its capacity as a government body with final rule-making authority.[8] She brought the issue of the appearance of partiality by lower court justices to the attention of the supreme court justices in her motion for rehearing on their decision to deny her petition for review. Texas Supreme Court justices who themselves participate in excessive fund raising (the more they raise the greater their odds of obtaining or retaining their seats and the more they carry forward into non-election years for use in "defraying" other expenses) are constitutionally dis-

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[8] TEXAS CONSTITUTION, Article V § 31(b):

"The Supreme Court shall promulgate rules of civil procedure for all courts not inconsistent with the laws of the state as may be necessary for the efficient and uniform administration of justice in the various courts."; and:

TEXAS GOVERNMENT CODE § 22.004 (c):

"So that the supreme court has full rulemaking power in civil actions, a rule adopted by the supreme court repeals all conflicting laws and parts of laws governing practice and procedure in civil actions, but substantive law is not repealed. At the time the supreme court files a rule, the court shall file with the secretary of state a list of each article or section of general law or each part of an article or section of general law that is repealed or modified in any way. The list has the same weight and effect as a decision of the court."

qualified by their financial interest in the subject matter to decide whether this same conduct by justices of the appellate court requires review or reversal.

The judicial election provisions of the TEXAS CONSTITUTION, the statutory provisions of the TEXAS ELECTION CODE for acceptance and expenditure of contributions, and the procedural rules promulgated by the Texas Supreme Court impermissibly conspire to prevent Petitioner from bringing to the attention of any Texas court the issue of her constitutional right as a United States citizen to hearing of her cause before a tribunal comprised of judges with no interest in the outcome of the issue of whether or not acceptance of contributions from parties with an interest in her case violates that constitutional right. *Henry v. Mississippi*, 379 U.S. 446, 446-449 (1965).

Disqualification of any judge who knows that he has an interest in the subject matter of a controversy is mandatory under both Texas and United States law. [9]

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[9] TEXAS CONSTITUTION, Article V § 11:

"No judge shall sit in any case wherein the judge may be interested, or where either of the parties may be connected with the judge, either by affinity or consanguinity, within such a degree as may be prescribed by law, or when the judge shall have been counsel in the case."; and:

28 U.S.C. 455(b)(4):

"(b)He shall also disqualify himself in the following circumstances:

(4) He knows that he, individually or as a fiduciary, or his spouse or minor child residing in his household, has a financial interest in the subject matter in controversy or in a party to the proceeding, or any other interest that could be substantially affected by the outcome of the proceeding." [This exact language is

Disqualification under such circumstances cannot be waived and Petitioner may raise the issue at any time. *Liljeberg v. Health Services Acquisition Corp.*, 486 U.S. 847, 851-852, 862-868 (1988). *Gulf Maritime Warehouse Company v. Towers*, 858 S.W.2d 556, 558-563 (Tex.App.–Beaumont 1993, *writ denied*). She raises it now before this Court.

CONCLUSION

The petition for a writ of certiorari should be granted and the judgment of the Tenth Court of Appeals reversed and remanded for hearing before a tribunal which is, and which appears to be, independent and impartial.

Respectfully submitted,

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Petitioner
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published as TEXAS RULE OF CIVIL PROCEDURE 18(b)(2)(e) dealing with recusal, but recusal is not mandatory in Texas and the right is deemed waived unless raised prior to judgment.]

TENTH COURT OF APPEALS

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November 14, 2001

In accordance with the enclosed Opinion, below is the judgment in the numbered cause set out herein to be entered in the Minutes of this Court as of the 14th day of November, 2001.

10-00-362-CV SUE WALSTON v. DAVID L. LOCKHART, REBECCA G. LOCKHART AND LARRY WALSTON – ON APPEAL FROM 170th DISTRICT COURT OF McLENNAN COUNTY – TRIAL COURT NO. 99-3504-4

JUDGMENT RENDERED, DISMISSING THE CAUSE – Opinion Per Curiam

"This cause came on to be heard on the transcript of the record, and the same being considered, because it is the opinion of this Court that the appeal should be dismissed; it is therefore ordered, adjudged and decreed that the appeal be, and hereby is, dismissed for want of jurisdiction in accordance with the opinion of this Court. It is further ordered that Appellant Sue Walston pay all costs in this behalf expended and that this decision be certified below for observance."

IN THE

TENTH COURT OF APPEALS

No. 10-00-362-CV

SUE WALSTON,

Appellant

v.

DAVID L. LOCKHART,
REBECCA G. LOCKHART
AND LARRY WALSTON,

Appellees

From the 170th District Court
McLennan County, Texas
Trial Court # 99-3504-4

OPINION

Sue Walston and her former husband, Larry, were divorced on January 11, 1994. Walston appealed. Larry filed a separate suit for partition of the real estate they had occupied as their home, asking that the proceeds be distributed according to the divorce decree. The court in which the suit for partition was filed appointed a receiver, Jim Stewart, to sell the property. Walston appealed from that order.[1] On January 24, 1995, the trial court signed an order (1) approving a contract

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[1] In Cause No. 10-94-251-CV, we ultimately determined, after the property had been sold, that her appeal from the order appointing the receiver was moot.

whereby David and Rebecca Lockharts agreed to purchase the property and (2) authorizing the receiver to sell it.[2] On February 6, 1995, the receiver conveyed the property to the Lockharts. Over three years later, on November 9, 1999, Walston sued Larry and the Lockharts in trespass to try title. She claims that, because Stewart did not strictly comply with the terms of the order authorizing the sale, the deed is void.

The Lockharts filed a motion for summary judgment, which the court granted in part on their assertion that Walston lacks standing to maintain the suit. Because we find the standing question dispositive, we do not reach Walston's issues on the merits.

Briefly, the standards for reviewing a summary judgment are:

(1) The movant for summary judgment has the burden of showing that there is no genuine issue of material fact and that the movant is entitled to judgment as a matter of law.

(2) In deciding whether there is a disputed material fact issue precluding summary judgment, evidence favorable to the non-movant will be taken as true.

(3) Every reasonable inference must be indulged in favor of the non-movant and any doubts resolved in

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[2] The order signed on January 24 recites that Walston appeared in person and by her attorney and that the approval of the contract of sale was conditioned on it being modified, presumably at her request, to allow her to remain in the residence until February 1, 1995.

her favor. *Nixon v. Mr. Property Management Co.*, 690 S.W.2d 546, 548-49 (Tex. 1985). We review a summary judgment de novo. *Rucker v. Bank One*, 36 S.W.3d 649, 652-53 (Tex. App.—Waco 2000, pet. filed).

The requirement of standing is implicit in the Texas Constitution's open courts provision, which contemplates access to the courts only for those litigants suffering an injury. *The M.D. Anderson Cancer Center v. Novak*, - - - S.W.3d - - -, - - - (Tex. 2001) (*citing Tex. Ass'n of Bus. v. Tex. Air Control Bd.*, 852 S.W.2d 440, 444 (Tex. 1993)). Standing is a prerequisite to subject-matter jurisdiction, and subject-matter jurisdiction is essential to a court's power to decide a case. *Id.* (*citing Bland Indep. Sch. Dist. v. Blue*, 34 S.W.3d 547, 553-54 (Tex. 2000)). "[S]tanding focuses on the question of who may bring an action." *Id.* (*citing Patterson v. Planned Parenthood*, 971 S.W.2d 439, 442 (Tex. 1998)). Standing, as a component of subject matter jurisdiction, is an issue that may be raised by the court for the first time on appeal; it may not be waived by the parties. *Tex. Ass'n of Bus. v. Tex. Air Control Bd.*, 852 S.W.2d 440, 445-46 (Tex. 1993). Subject matter jurisdiction is never presumed. *Id.* at 444.

A discussion of the standing issue must begin with the proposition that from the moment the court appointed the receiver over the property, the property was *in custodia legis*. *Tex Trunk Ry. Co. v. Lewis*, 81 Tex. 1, 16 S.W. 647, 649 (1891) ("We understand the courts to hold, almost without dissent, that, after the appointment of a receiver, the property to which the receivership relates is to be deemed in the custody of

the law, and this seems to us the correct rule."); *see also First S. Props., Inc. v. Vallone*, 533 S.W.2d 339, 341 (Tex. 1976).

The deed which Walston attacks was between the court-appointed receiver and the Lockharts. When she filed this suit she had no ownership interest in the affected land, because her interest had been sold by the receiver. Accordingly, even if the sale was not made in strict compliance with the terms of the order authorizing it, Walston was not "personally aggrieved." *See Marburger v. Seminole Pipeline Co.*, 957 S.W.2d 82, 89-90 (Tex. App.—Houston [14th Dist.] 1997, pet. denied) (husband who had no ownership interest in his wife's separate real property did not have standing to contest validity of easement over land); *Hollar v. Jowers*, 310 S.W.2d 721, 724 (Tex. Civ. App.—Eastland 1958, writ ref'd n.r.e.) (party who had no ownership in land was not entitled to bring suit to cancel deeds).

Walston can obtain no relief in the form she seeks, which is the recovery of title to the property. Nothing about the present suit can change the order appointing the receiver and placing the property in the receivership. That order, along with the order authorizing the sale and the order discharging the receiver and closing the receivership, is final. Furthermore, although there may have been irregularities in the sale, as alleged, yet, as Walston was a party to the receivership proceedings, any irregularities could only be timely called into question by an appeal from the court's ruling upon proper motion made and filed in that cause, not in an

independent action in trespass to try title to the land as done here. *See Sherwood v. Kelly*, 257 S.W. 278, 279 (Tex. Civ. App.—San Antonio 1923, writ dism'd).

We conclude that, under these circumstances, Walston does not have standing to bring this action claiming title to the real estate. In so finding, we do not reach her issues on appeal. We render the judgment that the trial court should have rendered. The cause is dismissed for lack of jurisdiction.

PER CURIAM

Before Chief Justice Davis,
Justice Vance, and
Justice Gray
Judgment rendered dismissing the cause
Opinion delivered and filed November 14, 2001
Do not publish

TENTH COURT OF APPEALS

January 2, 2002

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RE: Court of Appeals Number: 10-00-00362-CV

STYLE: Sue Walston
v.
David L. Lockhart, Rebecca G. Lockhart and Larry Walston

Appellant's motion for rehearing was denied today. Justice Gray dissenting.

Sincerely,

Sharri Roessler, Clerk
/s/Lillian Kissinger
By: Lillian Kissinger, Deputy Clerk

IN THE
TENTH COURT OF APPEALS

No. 10-00-362-CV

SUE WALSTON,
Appellant
v.
DAVID L. LOCKHART,
REBECCA G. LOCKHART
AND LARRY WALSTON,
Appellees

From the 170th District Court
McLennan County, Texas
Trial Court # 99-3504-4

ORDER

Our opinion in this cause, dated November 14, 2001, is re-designated "Publish."

PER CURIAM

Before Chief Justice Davis,
Justice Vance, and
Justice Gray
Order delivered and filed January 2, 2002
Do not publish

IN THE
TENTH COURT OF APPEALS

No. 10-00-362-CV

SUE WALSTON,

Appellant

v.

DAVID L. LOCKHART,
REBECCA G. LOCKHART
AND LARRY WALSTON,

Appellees

From the 170th District Court
McLennan County, Texas
Trial Court # 99-3504-4

DISSENTING OPINION ON MOTION FOR REHEARING

This is an appeal of a summary judgment entered in favor of David L. Lockhart and Rebecca G. Lockhart in a trespass to try title case brought by Sue Walston. Both parties filed Motions for Summary Judgment. In two issues, Walston claimed the trial court erred in granting summary judgment in favor of the Lockharts and in denying her motion. We affirmed the judgment. Because of issues raised in her motion for rehearing, I believe that the law requires that the judgment be reversed and remanded for further proceedings.

Background

This has been a long and torturous case for all persons involved, including this court. I do not know, nor do I care, what motivates the parties. While I may wish to put this matter to an end, my duty is to apply the law. I believe the law, on this set of facts and in this procedural posture, lies with Walston.

In 1992, Walston filed for divorce. In 1994, a final decree of divorce was entered making certain divisions of the marital property. Walston appealed the property division. The case was remanded to the trial court for a just and right division of the community property. *Walston v. Walston,* No. 10-94-169-CV, No. 10-94-251-CV (Tex. App.—Waco 1995, writ denied)(not designated for publication). On remand, the trial court awarded specific community property to each party and awarded each an undivided fifty percent interest in the remainder. The judgment directed the parties to attempt to reach an agreement on the division or sale of the community property, warning that if no agreement was reached the court would consider the appointment of a receiver. Walston again appealed. We held that the trial court had abused its discretion by awarding each party an undivided fifty percent interest rather than dividing the community property between the two parties. We again reversed and remanded the division of the entire community estate to the trial court for just and right division. *Walston v. Walston,* 971 S.W.2d 687 (Tex. App.—Waco 1998, pet. denied).

While the first appeal of the property division was pending, Walston's ex-husband instituted a partition

suit seeking to have the homestead sold. The trial court appointed a receiver to sell the home and to divide the proceeds between the parties. Walston brought a separate appeal challenging the appointment of the receiver. During the pendency of the receivership, Walston filed three motions for leave to file a petition for a writ of mandamus, seeking to prohibit the court from continuing with the receivership. In unpublished opinions, we denied leave to file each time.

In December 1994, the trial court found that an offer from the Lockharts to purchase the property was appropriate for acceptance and ordered that the receiver convey the property to the Lockharts upon compliance "with the terms of the sale as set forth in the contract as modified, approved and confirmed herein." Section 4 of the Contract for Sale reads in part: "If financing (including any financed PMI premium) or assumption approval is not obtained within 30 days after the effective date hereof, this contract shall terminate and the Earnest Money shall be refunded to Buyer." Regarding closing, Section 9 of the contract provided:

> The closing of the sale shall be on or before February 1, 1995, or within 7 days after objections to title and survey have been cured, whichever date is later (the Closing Date); *however if financing or assumption approval has been obtained pursuant to Paragraph 4*, the closing date shall be extended up to 15 days only if necessary to comply with the lender's closing requirements (for example, survey, insurance

policies, property repairs, closing documents). (Italics in original.)

The effective date of the contract is December 19, 1994. On January 31, 1995, the title company notified the Lockharts that the underwriter was not willing to issue a clear policy and requested that the closing be postponed until further resolution of issues of concern to the title company. The Lockharts subsequently invoked the provisions of Section 9 to extend the closing deadline beyond February 1, 1995, to a time within 7 days after objections to title were cured. The Lockharts purchased the property on February 6, 1995. On February 15, 1995, the trial court discharged the receiver and closed the receivership. From the record before us, the trial court never rendered an order confirming the sale to the Lockharts. At that point, finding that the controversy over the appointment of the receiver was moot, we dismissed the appeal from the order appointing a receiver for want of jurisdiction. *See Walston v. Walston,* No. 10-94-169-CV & No. 10-94-251-CV (Tex. App.—Waco 1995, writ denied) (not designated for publication).

In November 1999, Walston brought a separate trespass to try title suit. Walston contended that the Lockharts did not obtain financing on or before January 18, 1995, thus failing to comply with the terms of sale as set forth in the terms of the contract. Walston claims that according to its terms, the contract terminated on January 18, 1995. According to Walston, when the receiver sold the property on February 6, 1995, he acted beyond his authority, and thus, the deed

of conveyance to the Lockharts was void. Larry Walston was named as a party in the original trespass to try title suit. The Lockharts filed a motion for summary judgment on Walston's claims, and Walston filed a motion for summary judgment as to all claims against the Lockharts and Larry. The court granted the motion of the Lockharts and denied Walston's motion. Because the relief requested against Larry appeared to be unresolved, we questioned our jurisdiction. The appeal was abated. The trial court revised its order and severed the claims against the Lockharts from those against Larry. Walston appeals the judgment, contending that she has established her right to title and possession of the premises, or at least presented some evidence of a disputed fact that thus precluded summary judgment against her.

The majority disposed of this case on original submission by holding that Walston had no standing to pursue the issue. The opinion relies primarily on the concept that once placed in the custody of the court for purposes of partition, the property remained there until conveyed. Further, the opinion holds that whatever interest Walston had in the property was conveyed by the receiver. Therefore, so the theory goes, Walston has no interest in the property and therefore has no standing to raise the issue of the validity of the receiver's deed.

In her motion for rehearing, Walston asserts in bold text that ". . . it is the order of confirmation and not the order of sale and not the order of discharge which cures any defects or irregularities in a receiver's sale." I agree.

We are the first court to hold otherwise. If the receiver's deed is set aside, the property is not in the custody of the court because the court proceeding has been closed. While the receivership was open, it may have had custody of the property. When it was closed, it could no longer have custody of the property. Thus, the property is no longer in the custody of the receiver or the court. Also, the receivership was closed without confirmation of the sale.

The receiver had court authority to convey title for the owners under a partition proceeding. The trial court specified the conditions under which it could be conveyed. A purported conveyance was made. The receiver was discharged and the partition action was closed. Walston challenges that the conveyance was not in conformity with the order authorizing the sale. If the conveyance is void, she still owns an interest in the property. Further, she was the equitable beneficiary of the receivership. Equitable title never left her unless the conveyance was valid. Thus I believe Walston has standing to challenge the receiver's deed.

To accept the court's original opinion is to hold that regardless of what impropriety the receiver commits, once the partition proceeding is closed, a trespass to try title action brought by one who would be the owner of the property if the partition deed is set aside as void is never proper. This simply cannot be the law. For the reasons more fully detailed below, the original opinion should be withdrawn, the judgment reversed, and the cause remanded for further proceedings.

Standards of Review

Trespass to try title

A trespass to try title action is an exclusive remedy by which to resolve competing claims to property. *Ely v. Briley,* 959 S.W.2d 723, 727 (Tex. App.—Austin 1998, no pet.). This cause of action always places both the title and possession in issue. *Permian Oil Co. v. Smith,* 73 S.W.2d 490, 497 (Tex. 1934). To maintain the action, the plaintiff ordinarily must have a present right of possession of the lands that are the subject of the controversy. *Wall v. Carrell,* 894 S.W.2d 788, 796 (Tex. App.—Tyler 1994, writ denied). Further, the plaintiff must have title to the land that he seeks to recover. *Id.* If it is not proven that the defendant is a mere trespasser, the plaintiff must establish not only title to an undivided interest in the property but also that the defendant has no title to any interest in the property. *Pettis v. Achille,* 313 S.W.2d 348, 351 (Tex. App. —Houston [1st Dist.] 1958, no writ).

Summary judgment

Generally upon review of a summary judgment, a court determines whether the movant has shown that no genuine issue of material fact exists and is entitled to judgment as a matter of law. TEX. R. CIV. P. 166a(c); *Nixon v. Mr. Property Management Co.,* 690 S.W.2d 546, 548 (Tex. 1985). When both parties move for summary judgment and the trial court grants one motion and denies the other, the appellate court should determine all questions presented. *See Jones v. Strauss,* 745 S.W.2d 898, 900 (Tex. 1988). When reviewing a summary judgment granted on general or unstated grounds, we

consider whether any theories set forth in the motion will support the summary judgment. *See State Farm Fire & Cas. Co. v. S.S.*, 858 S.W.2d 374, 380 (Tex. 1993).

The Lockhart motion

The Lockharts presented the following grounds to the trial court in their motion for summary judgment:

1. Res judicata bars Walston's claim; and
2. Walston was not a party to the contract for sale between the receiver and the Lockharts.

The court granted the motion for summary judgment, but did not state the grounds upon which it made its ruling.

The Lockharts contend that either of these grounds defeats Walston's trespass to try title action. If either of the grounds presented by the Lockharts disposes of Walston's claim, we must affirm the trial court's judgment.

Res judicata

Res judicata precludes relitigation of a claim or cause of action that has been finally adjudicated, as well as related matters that, with the use of diligence, should have been litigated in the prior suit. *McGee v. McGee*, 936 S.W.2d 360, 364 (Tex. App.—Waco 1996, writ denied). Res judicata may be invoked to bar further proceedings if (1) a court of competent jurisdiction has rendered a prior judgment; (2) there was a final judgment on the merits; (3) the parties, or those in privity with them, are identical in both suits; and (4) the same cause of action is involved in both suits. *Tippit v. Tippit*, 865 S.W.2d 624 (Tex. App.—Waco 1993, no pet.). While the rule of res judicata bars litigation of all issues

connected with a cause of action that might have been tried in a former suit, the rule does not bar a second suit based on a different cause of action. *Ogletree v. Crates*, 363 S.W.2d 431, 436 (Tex. 1963).

In their brief, the Lockharts claim that the *Tippit* requirements have been fulfilled. I disagree. Walston is contesting the authority of the receiver to sell the property under an expired contract. She had previously contested the appointment of the receiver, claiming abuse of discretion and lack of jurisdiction by the trial court. *See Walston v. Walston*, No. 10-94-251-CV, No. 10-94-251-CV (Tex. App.—Waco 1995, writ denied) (not designated for publication). When the trial court discharged the receiver and terminated the receivership, we found that we no longer had jurisdiction because the underlying controversy, the propriety of appointing a receiver, had ended. Finding the issue moot, we dismissed the appeal. We did not render a final judgment on the merits of the appointment or the propriety of any actions the receiver had taken.

In response to Walston's argument that the issue in the appeal of the appointment of the receiver was not moot, we distinguished between challenging the appointment of the receiver and questioning his actions in the sale of property:

> Sue might be able to set aside the sale of the house as an action based on a void order. However, this appeal involves the appointment of the receiver, not the sale of the house. Any decision we might render on this cause would

merely predict the outcome of a possible future suit to set aside the receiver's deed under which the house was sold. *Id.*

Walston accepted the ruling of this court regarding the appointment of the receiver and, as suggested in our opinion, filed a new suit based on a different cause of action, trespass to try title. The trespass to try title challenged the validity of the Lockhart's title, not by attacking the appointment of the receiver, but rather by attacking the deed signed by the receiver. Furthermore, from the record before us, it does not appear that the trial court entered a final order confirming the receiver's actions in conveying the property to the Lockharts. A confirmation of the sale, or something from which a confirmation might be inferred, is required to render the sale effective. *See Baumgarten v. Frost,* 143 Tex. 533, 186 S.W.2d 82 (Tex. 1945).[1]

Therefore, the *Tippit* requirements are not satisfied: different causes of action are involved and entry of a final judgment on the merits has not been established. Accordingly, res judicata will not sustain the judgment.

Standing (as raised by the Lockharts)

In order to maintain a suit, a person must have standing to litigate the matters in issue. *See Hunt v. Bass,* 664 S.W.2d 323, 324 (Tex. 1984). One has standing to sue if:

(1) he has sustained, or is in immediate danger of

---

[1] It could be argued that the court's order discharging the receiver infers confirmation of the sale. *Id.* However, that order is not in the record before us.

sustaining, some direct injury as a result of the wrongful act of which he complains;

(2) he has a direct relationship between the alleged injury and claim sought to be adjudicated;

(3) he has a personal stake in the controversy; and

(4) (a) the challenged action has caused him some injury in fact. . .; or

(b) he is an appropriate party to assert the public's interest in the matter as well as his own interest.

City of Bells v. Greater Texoma Util. Auth., 744 S.W.2d 636, 639 (Tex. App.—Dallas 1987, no writ).

The Lockharts argue that Walston lacked standing to cancel, rescind, or argue for the termination of the contract for sale and cite *Glass v. Carpenter,* which holds that only a party to a contract is entitled to maintain such a suit. *Glass v. Carpenter,* 330 S.W.2d 530 (Tex. App.—San Antonio 1959, writ ref'd n.r.e.). Walston, however, is not suing to cancel, rescind or terminate the contract. Walston is challenging the validity of a deed conveying title to property in which she claims an interest by pointing out that the contract for sale had previously terminated by its own terms prior to the conveyance of the property by a court-appointed receiver. Walston has produced a certified copy of a deed transferring ownership of the property to her and her ex-husband. The copies of the contract-for-sale and the sales settlement form produced by the Lockharts reflect only that Walston did not sign the contract—not

that she lacked standing to challenge the validity of the deed under which they claim title. Accordingly, lack of standing will not sustain the judgment.

Summary

For a defendant to prevail on summary judgment, the defendant must show that there is no genuine issue of material fact concerning one or more essential elements of the plaintiff's cause of action or establish each element of an affirmative defense as a matter of law. *Black v. Victoria Lloyds Ins. Co.*, 729 S.W.2d 20, 27 (Tex. 1990). The Lockharts have not established that there is no genuine issue of material fact concerning the validity of the deed by the receiver, nor have they established the affirmative defense of res judicata. Therefore, I would hold that the trial court erred in granting the motion for summary judgment filed by the Lockharts and affirm Walston's first issue.

The Walston motion

Walston asserts in her second issue that she established each element of her case in her motion for summary judgment. I disagree.

Standard of Review: Plaintiff's Motion for Summary Judgment

When, as here, the plaintiff moves for summary judgment, the plaintiff must conclusively prove all elements of its cause of action as a matter of law. *Nationwide Property & Casualty Ins. Co. v. McFarland*, 887 S.W.2d 487, 490 (Tex. App.—Dallas 1994, writ denied); *see* TEX. R. CIV. P. 166a(c). A matter is conclusively established if ordinary minds could not differ as to the conclusion to be drawn from the evidence. *Triton Oil &*

Gas Corp. v. Marine Contractors & Supply, Inc., 644 S.W.2d 443, 446 (Tex. 1982). Once the plaintiff establishes its right to summary judgment, the burden then shifts to the defendant as non-movant to present evidence which raises a genuine issue of material fact, thereby precluding summary judgment. *See City of Houston v. Clear Creek Basin Auth.*, 589 S.W.2d 671, 678 (Tex. 1979); *Muckelroy v. Richardson Indep. Sch. Dist.*, 884 S.W.2d 825, 828 (Tex. App.—Dallas 1994, writ denied).

Elements of cause of action

Walston lists the essential elements of her claim against the Lockharts as: (1) the contract for sale terminated automatically on January 18, 1995, when the Lockharts failed to obtain financing by that date; (2) the Lockharts did not obtain financing until February 6, 1995; (3) the order of sale was dependent upon the contract for sale, and the contract expired on January 18, 1995; (4) Walston holds rightful title as against any stranger to the property; (5) Walston's property has sustained permanent damage while occupied by the Lockharts; (6) the Lockharts were served with Notice and Demand to Vacate and have refused to vacate or pay rent. These are actually evidentiary facts that must be proven to prevail on her trespass to try title claim. Facts 1-4 relate to Walston's claim of title. The remaining facts relate to her claim for damages and rents if she successfully establishes her title. Facts 1 and 2 relate to the element of a trespass to try title action to prove that the defendant, in this case the Lockharts, has no right, title, or interest in the property. *Pettis*, 313 S.W.2d at 251.

Walston's challenge to the Lockharts' title is dependent upon the date that the Lockharts obtained financing. Walston's only evidence that the Lockharts did not have financing available on January 18, 1995, is a closing document entitled Notice of Final Agreement dated February 6, 1995. As the Lockharts point out, this proves only that a mortgage company funded the loan for the purchase of property on the date of closing and that the loan documents signed that day were the final agreements between the bank and the Lockharts. These closing documents do not conclusively establish the date by which the Lockharts had obtained financing. Common sense tells us that the normal course of a real estate transaction involves obtaining financing before the date of closing. Thus, there is a disputed material fact issue regarding the date financing was obtained.

Summary

Walston has not shown that she is entitled to judgment as a matter of law, and the trial court did not err in denying her motion for summary judgment. Because she has not established her trespass to try title action, we would likewise be precluded from rendering judgment for damages or rent. Therefore, I would overrule Walston's second issue.

The Lockharts' cross-points

The Lockharts presented two cross-points for our consideration.

Cross-Point No.1

The Lockharts requested that the Notice of Lis Pendens filed by Walston on or about November 17, 2000, be discharged and that Walston be barred from

filing any additional Notices of Lis Pendens regarding the property that is the basis of this suit. This court does not have the authority on an appeal from summary judgment to grant relief never previously requested. TEX. R. APP. P. 33. Cross-point no. 1 should be denied.

Cross-Point No. 2

The Lockharts also asked for sanctions pursuant to the Texas Rules of Appellate Procedure: "[T]his court is authorized to award 'just damages' if it determines that an appeal is frivolous.'" TEX. R. APP. P. 45. I would sustain one of Walston's issues and thus do not find this appeal is frivolous. Cross-point no. 2 should be denied.

CONCLUSION

Because neither party has established a right to summary judgment, I would remand this cause to the trial court for further proceedings. Because the majority does not, I respectfully dissent.

TOM GRAY
Justice

Dissenting opinion delivered and filed January 2, 2002
Publish

THE SUPREME COURT OF TEXAS

July 11, 2002

Ms. Sue Walston
3231 Ferndale Drive
Waco, TX .76706

Mr. Richard Dwayne Danner
1945 Walnut Hill Lane
Irving, TX 75038

RE: Case Number 02-0147
Court of Appeals Number: 10-00-00362-CV
Trial Court Number: 99-3504-4

Style: SUE WALSTON
v.
DAVID L. LOCKHART AND
REBECCA G. LOCKHART

Dear Counsel:

Today the Supreme Court of Texas denied the motion for rehearing of the above styled petition for review.

Sincerely,

Andrew Weber, Clerk

By: /s/Gena Pelham
Gena Pelham, Deputy Clerk

Cc: Ms. Sharri Roessler, Clerk
Mr. Joe Johnson

No. 02-0147

IN THE SUPREME COURT

STATE OF TEXAS

SUE WALSTON

Petitioner

V.

DAVID L. LOCKHART and REBECCA G. LOCKHART

Respondents

From the Tenth Court of Appeals
Waco, Texas

PETITIONER'S MOTION FOR REHEARING

SUE WALSTON
Petitioner
3231 Ferndale Drive
Waco, Texas 76706
Telephone: 254.662.2270

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I. The Court has failed to resolve the issue of whether collateral attack of a void sale is permissible in cases in which the property is sold while in *custodia legis*. The Court has overlooked statutes and decisions that are controlling as authority, and which would require a different judgment from that rendered by the court of appeals where that court's majority opinion erroneously construes the doctrine of *custodia legis*, disregards provisions of law put in place by the Legislature to protect citizens, fails to make a distinction between the mere erroneous exercise of power granted, and the usurpation of power where none exists, fails to apply controlling authorities and is likely to encourage and accelerate recurrence by misleading or confusing lower courts and other court of appeals. 2

II. The Court has overlooked and failed to apply its own decision in the case of *Baumgarten v. Frost*, which holds that a judicial sale by a receiver must be confirmed by the court which authorized the sale. Failure of the

Court to require appellate courts to adhere to its prior decisions impermissibly allows lower courts to create new law by applying discretion where none has been granted by statute, and is against the public interest. 7

III. It appears that the judgment of the Tenth Court of Appeals may have been tainted by partiality on the part of the majority justices who participated in the decision 7

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Drafting Issues In The Texas Supreme Court
By Pamela Stanton Baron, copyright 2001 2

IN THE SUPREME COURT

STATE OF TEXAS

SUE WALSTON

Petitioner

V.

DAVID L. LOCKHART and REBECCA G. LOCKHART

Respondents

PETITIONER'S MOTION FOR REHEARING

TO THE HONORABLE SUPREME COURT:

PETITIONER SUE WALSTON makes this motion for rehearing and for the Court to reconsider its decision to deny her petition for review. In support of her motion Petitioner would show:

During the pendency of Petitioner's appeal of a 1994, division of marital property, her ex-husband filed a separate partition suit requesting that the court appoint a receiver to sell the parties' marital home. The property was sold by the receiver in 1995, and the

receiver was discharged shortly after the sale. Petition filed a trespass to try title suit against purchasers claiming that the sale is void because the receiver exceeded his authority by selling the property after the order of sale expired when the purchasers failed to comply with the terms of the only court-approved contract for sale upon which the order of sale was dependent. The trial court denied Petitioner's motion for summary judgment and granted summary judgment for Respondents for unspecified reasons. Petitioner appealed and the Tenth Court of Appeals determined *sua sponte* in a published *per curiam* opinion, with dissent by Justice Gray, that Petitioner lacks standing to complain in a collateral attack of any impropriety by the receiver. After requesting a response, this Court denied Petitioner's petition for review.

I.

The Court has failed to resolve the issue of whether collateral attack of a void sale is permissible in cases in which the property is sold while in *custodia legis*. The Court has overlooked statutes and decisions that are controlling as authority, and which would require a different judgment from that rendered by the court of appeals where that court's majority opinion erroneously construes the doctrine of *custodia legis*, disregards provisions of law put in place by the Legislature to protect citizens, fails to make a distinction between the mere erroneous exercise of power granted, and the usurpation of power where none exists, fails to apply controlling authorities and is

likely to encourage and accelerate recurrence by misleading or confusing lower courts.

In a paper entitled *Drafting Issues In The Texas Supreme Court* presented in part by Justice Owen at the 15th Annual Advanced Civil Appellate Practice Course, 2001, the author suggests that, in recasting the issues, the respondent should concentrate on the facts of the case and utilize what the author refers to as the Casablanca defense: "... the problems of three little people don't amount to a hill of beans in this crazy world."[1] Cute, but those of us who live in the real world have a less polite label for this approach. Petitioner is distressed that the Court can be baffled by it and even more distressed that individual justices of the Court would promote this vulnerability.

In this case, Petitioner claims that an un-authorized sale of her property by a receiver is void and the appellate court majority has determined in an unprecedented published opinion that, "regardless of what impropriety the receiver commits, once the partition proceeding is closed, a trespass to try title action brought by one who would be the owner of the property if the partition deed is set aside as void is never proper." *Walston v. Lockhart,* 62 S.W.3d 257, 262 (Tex.App-Waco 2002), (attached hereto as Exhibit A).

Arguments presented in Respondents' response to the petition supporting lack of necessity for confirmation are relevant only to the issue of whether a

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[1] *Drafting Issues In The Texas Supreme Court* by Pamela Stanton Baron, copyright 2001

party has remedy by direct appeal and Petitioner, who is not a lawyer, is embarrassed to have been suckered into replying to arguments of the facts and apologizes to the Court for wasting time and effort. This Court has already established that confirmation of sales made by receivers is required and the Tenth Court of Appeals now finds otherwise. *Baumgarten v. Frost*, 186 S.W.2d 952 (Texas 1945). None of the arguments offered by Respondents address the permissibility of collateral attack on void actions of a receiver and none of the facts of the case establish that this issue doesn't "amount to a hill of beans". If that hill is illegally sold by a receiver and the receivership closed, the appellate opinion in this case may be cited as authority to put that sale beyond the reach of the law.

The published opinion of the appellate court establishes a new rule of law and then applies that new rule to a novel fact situation which is likely to recur in future cases and which involves a legal issue of continuing public interest. The Court should not wait to review the issue until it is raised by a corporation, a railroad or a non-resident or missing person whose property was misappropriated by a receiver.

As Petitioner points out in her petition, the appellate court has disregarded the legislative intent to protect citizens of the state from malfeasance by receivers as set out in TEXAS CIVIL PRACTICE AND REMEDIES CODE §64.031 which limits the power of receivers to performance only of those acts specifically authorized by the court. Because appointment of a receiver is one of the harshest remedies available to the

court, extraordinary care should be taken to ensure that the parties are protected against any impropriety. We will never know what action the trial judge would have taken if the receiver in this case had come forward and informed the court that the contract between he and Respondents had terminated and was no longer effective. The court might have approved a new contract, or the court might have decided to maintain the status quo of the property pending the outcome of Petitioner's appeal of the division of property.

Whether the receiver's actions were the result of fraud or the result of mistake is not an issue in this trespass to try title case, but whether Petitioner has standing to collaterally attack a sale which was never authorized by the court is at issue. If a party cannot sue by collateral attack to recover property sold by a receiver and cannot make a direct attack either by motion or by bill of review in a trial court that lost its jurisdiction when the receivership ended then that party has no access to the courts for redress for injury caused by usurpation of authority by a receiver. This is the second published account where the issue of permissibility of collateral attack of a sale by receiver has come before the appellate courts and acceleration of recurrence is almost guaranteed now that the majority opinion may be cited as authority for removing the onus of confirmation. As Petitioner previously pointed out to the Court, the potential for abuse is staggering.

Sherwood v. Kelly is the only authority cited by the majority to support its theory that a party to a receivership proceeding lacks standing to sue in

trespass to try title. The court in *Sherwood* found that the effect of any receivership:

> "...draws to the court the possession and custody of the property for its ultimate disposition, so that purchasers may take title thereto against all the parties by **sales made under the direction and orders of the court**." (emphasis added).

The court recites in its opinion that the sale in that case was duly confirmed, leaving all parties to the receivership with remedy by appeal. The *Sherwood* court cites no authority supporting its opinion that, once a receiver is appointed, parties are permanently divested of title which passes to the receiver along with possession. This theory would seem to be contrary to the public interest. *Sherwood v. Kelly*, 257 S.W. 278, 279 (Tex.Civ.App.-San Antonio 1923, writ dism'd). The Supreme Court dismissed Sherwood's petition for writ of error which, by today's rules, indicates that the Court had no jurisdiction. If in 1923, "writ dismissed" carried the same connotation as it does today, then, without the guidance of a written opinion, it is impossible to know why the Court felt that it had no jurisdiction to consider an issue upon which it had not previously ruled. Perhaps the points of error as presented in Sherwood's petition did not properly extend to any questions of law arising from the types of cases set out in TEXAS GOVERNMENT CODE §22.001 Jurisdiction (of Supreme Court) or to whatever statutory authority applied at the time. Petitioner notes that today, where dismissal does not carry the same precedential weight as "refused",

the Supreme Court does not appear to have finally determined whether the same laws that allow collateral attack of void sales by sheriff's, constables, commissioners, executors and other officers of the court apply equally to void sales by receivers. Common sense would seem to dictate that an unauthorized void sale is an unauthorized void sale, but the appellate courts in San Antonio and Waco disagree.

The majority in this case cites no authority to support its opinion that an unauthorized sale is a mere irregularity or that direct appeal (of what order is not clear) is the **exclusive remedy** afforded a party who discovers that a receiver exceeded his authority in disposing of property absent direction from the court. (Exhibit A, p. 259). It is not true that every asserted error of law can be or need be raised by normal appeal. As noted above, in cases of void sales by other court officers a party is free to seek redress for impropriety by way of: direct motion and appeal; bill of review, collateral suit claiming void order, collateral suit against officer for fraud, collateral suit for damages by conversion, or collateral suit in trespass to try title, all subject to limitations; and probably a host of other remedies beyond the limited scope of Petitioner's knowledge of the law.

If the appellate opinion is left uncorrected, there is no remedy available for redress of injury caused by impropriety by a receiver which is discovered after the receivership is closed and no remedy at all if no confirmation order is required, thus depriving a party of his property and denying him the right to be heard

in court in violation of both substantive and procedural due process protections guaranteed by the Texas Constitution and the United States Constitution.

II.

The Court has overlooked and failed to apply its own decision in the case of *Baumgarten v. Frost*, 186 S.W.2d 982 (Texas 1945), which holds that a judicial sale by a receiver must be confirmed by the court which authorized the sale. Failure of the Court to require appellate courts to adhere to its prior decisions impermissibly allows lower courts to create new law by applying discretion where none has been granted by statute and is against the public interest.

This has become a maxim of law adhered to by this Court and the appellate courts until the Tenth Court of Appeals decided in this case that confirmation of judicial sales by receivers is no longer necessary. Absent a final confirmation order, a party cannot seek relief by normal appeal and, if a party lacks standing to collaterally attack the sale, the party has no access to the courts. Failure of the Court to require appellate courts to adhere to its prior decisions promotes confusion in the lower courts and is against the public interest.

III.

It appears that the judgment of the Tenth Court of Appeals may have been tainted by partiality on the part of the majority justices who participated in the decision.

This case stems from Petitioner's divorce action

which began in 1992 and which is still pending in the trial court. During the ten-year course of those proceedings, judges sitting on the panel of the Tenth Court of Appeals, including Chief Justice Davis and Justice Vance, have made decisions relating to various motions and petitions filed by Petitioner and her attorneys. Some decisions have favored Petitioner and some have not, but, because the court has made a general practice of justifying its decisions, even when Petitioner was disappointed in a decision or disagreed with the court's findings, she has had no cause to question the impartiality of the court or of the individual justices who sat on the panel. The failure of the court in this case to cite any authority which might justify its *sua sponte* decision that Petitioner lacks standing and its seeming determination to ignore the maxims of law established by this Court and adhered to by other appellate courts, even in the face of Justice Gray's published dissent, has led Petitioner to suspect that inappropriate considerations have resulted in an improper judgment. Research of disclosure filings maintained by the Texas Ethics Commission reveals that:

Chief Justice Davis has regularly accepted campaign contributions from James H. (Jim) Stewart, the court- appointed receiver. These contributions are average rather than exceptional in terms of amount, but they do appear in both years that Justice Davis ran for reelection. Also appearing on disclosure filings are regular, substantial contributions from attorneys who are partners in the Waco law firm of Sheehy, Lovelace and Mayfield. It is well-known in Waco business circles

that, at the time of the sale of Petitioner's property and for some time afterward, First Title Company which handled the closing of the sale was owned by the partners of Sheehy, Lovelace and Mayfield. According to the Settlement Statement submitted in the trial court by Respondents, the law firm was paid $100.00 from the proceeds of the sale of Petitioner's property for some undisclosed services relating to the title. (Petition for Review, Tab Ec). Petitioner is not a lawyer and does not have sufficient knowledge of title insurance procedures to know whether the effects of a declaration that the sale is void, requiring payment by the title insurance carrier that employs Respondents' attorneys, would trickle down to First Title Company, and what, if any, liability might be retained by former owners. But the situation begs the question. This is not a case where an adverse ruling would ultimately only affect a contributing law firm's client. An adverse ruling in this case could directly affect the contributing law firm. Jim Stewart Realtors, Inc. brokered the 1995, sale to Respondents and Respondents have contracted with Jim Stewart Realtors, Inc. to sell the property again. Respondents' attorneys have alleged in amended pleadings that the receiver's actions were the result of fraud. What effect, if any, would a decision declaring the sale void have on Mr. Stewart and his real estate agency? Again, the situation begs the question. Although the Tenth District is made up of several counties, the majority of the campaign funds raised by Justice Davis appear to have come from the Waco area.

Justice Vance has disclosed several contributions by associates and partners of the Sheehy, Lovelace and

Mayfield firm. At the time of the sale, a court briefing attorney who was close to Justice Vance was married to an associate of the law firm. Like Justice Davis, Justice Vance appears to have raised the majority of his campaign funds from the Waco area.

Conversely, Justice Gray, who has written and published a well laid-out dissent, fully justified by citation of case law, and whose roots are not in Waco, does not appear to have accepted campaign contributions from any person or entity involved in the case. Petitioner does not agree with all of Justice Gray's conclusions, but nothing in his published opinion would have prompted suspicion of his motives.

Taken alone, none of the facts above necessarily warrant suspicion of partiality; but, taken in the context of this case, the cumulative effect of contributions from individuals who profited by their participation in a sale which even the majority has deemed "irregular", two justices whose behavior is uncharacteristic, small town politics, and a lengthy dissent by the one justice who has no apparent association with anyone involved in the case, is the appearance that the judgment may be the result of improper consideration by the court.

Where this Court has repeatedly determined that campaign contributions alone are not cause for recusal, this information would have been of no use to Petitioner prior to the appellate judgment. Petitioner had no cause for suspicion prior to rendition of the appellate judgment and she takes no pleasure in voicing her suspicions now.

Where denial of the petition indicates that the

Court is not satisfied that the opinion of the court of appeals has correctly declared the law in all respects, Petitioner respectfully requests that the Court consider the above and review this case in the interest of justice. Petitioner's verification of the facts stated above appears on page 12 of this motion.

PRAYER FOR RELIEF

Petitioner respectfully requests that the court re-consider her petition for review and grant the petition.

Respectfully submitted,

/s/Sue Walston
SUE WALSTON
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CERTIFICATE OF SERVICE

I hereby certify that on the 7th day of June, 2002, a true and correct copy of the above and foregoing Motion for Rehearing was sent by certified mail, return receipt requested, to Dwayne Danner, attorney of record for Respondents David L. Lockhart and Rebecca G. Lockhart, at 1945 Walnut Hill Lane, Irving, TX 75038.

/s/Sue Walston
Sue Walston

MOTION FILED
NOV 12 2002

(2)

No. 02-570

IN THE
Supreme Court of the United States

SUE WALSTON,
Petitioner,

v.

DAVID L. LOCKHART and REBECCA G. LOCKHART,
Respondents.

On Petition for a Writ of Certiorari to the
Court of Appeals for the Tenth District of Texas,
at Waco, Texas

MOTION AND BRIEF OF AMICUS CURIAE PUBLIC CITIZEN IN SUPPORT OF THE PETITION

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32 pp

MOTION OF PUBLIC CITIZEN FOR LEAVE TO FILE BRIEF AMICUS CURIAE IN SUPPORT OF THE PETITION

Movant Public Citizen hereby seeks leave to file a brief amicus curiae in support of this pro se petition. The petition raises the question whether contributions to state judicial election campaigns can create an unconstitutional appearance of partiality, requiring recusal of the judge or judges who received the donations.*

Plaintiff Public Citizen, Inc., a nonprofit consumer advocacy organization incorporated and headquartered in the District of Columbia, has approximately 135,000 members, of whom approximately 3,200 live in Texas. Public Citizen has maintained an office in Austin, Texas, since 1984. Public Citizen is active before the United States Congress, the Texas legislature, and courts throughout the country on a wide variety of issues, including access to the civil justice system, campaign finance reform, and protection of the right to due process. Public Citizen and its Texas members have been and will continue to be parties to and appear as amicus curiae in litigation in Texas state courts. As a corporation, Public Citizen is forbidden by Texas law from contributing to political campaigns. Even if it were not prohibited from making contributions, it could not afford to make substantial contributions and, in any event, would not do so because it opposes the "purchasing of justice" in this manner.

In 2000, Public Citizen was one of the plaintiffs in a section 1983 case entitled *Public Citizen v. Bomer*. *Bomer* was

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* A letter stating petitioner's written consent has been lodged with the Clerk. Dwayne Danner, counsel for respondent, does not consent to the filing of a brief amicus curiae.

brought in the United States District Court for the Northern District of Texas by five Texas lawyers and two non-profit organizations, on behalf of themselves, their clients, and their members who had litigated and would litigate in Texas courts. Some of the plaintiffs contributed to judicial elections because they believed that not contributing would threaten their clients' access to impartial judges. Others did not contribute either because they could not afford to make substantial contributions, they were opposed to the Texas system for financing judicial elections, and/or, in the case of the organizational plaintiffs, they were prohibited by law from contributing. In addition, the clients of the lawyer plaintiffs were generally appearing in court for the first time and were often financially unable to contribute. The plaintiffs all believed that the current system of financing judicial elections creates the appearance, if not the reality, of partiality and impropriety of Texas state judges, to the detriment of the legal profession, the lawyer-plaintiffs' law practices, and their clients' and/or members' interests. The complaint in *Bomer* asked for a declaration that the current system, including the refusal of Texas courts to consider campaign contributions from a party or its lawyer to a judge on the case as a basis for recusal, is unconstitutional, leaving to the State of Texas the decision of what constitutional system should be adopted in its place. In September 2000, the district court granted defendant's motion to dismiss for failure to state a claim. In November 2001, a panel of the Fifth Circuit affirmed the dismissal of the case on the ground that the plaintiffs lacked standing. 274 F.3d 212 (5th Cir. 2001).

We believe that the Court will benefit from an amicus brief at the certiorari stage because the petitioner is pro se before this Court and is not herself a lawyer. We also believe that our brief will sharpen the issues set out in the petition and provide a more focused perspective on the due process issue

presented by state systems that allow parties and lawyers to contribute to the campaigns of the judges who preside over their cases. We therefore ask that Public Citizen be granted leave to file the accompanying brief amicus curiae in support of the petition.

Respectfully submitted,

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November 2002

QUESTION PRESENTED

Whether a state, consistent with due process, may adopt a rule that campaign contributions made by parties or lawyers to a judge sitting on their case can never form the basis for the judge's recusal—no matter how large the contributions, when they were made, or whether the judge personally solicited them.

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INTRODUCTION

Under the Texas system of financing judicial elections, lawyers who regularly appear in court and parties who are frequent litigants routinely contribute thousands of dollars to the campaigns of judges who then preside over their cases. Those contributions can be and often are made while a case is pending before the judge. In addition, Texas law expressly authorizes judges personally to solicit campaign funds from parties and lawyers. Yet under Texas law, a judge is never subject to a motion for recusal based on campaign contributions that were made to the judge by a party and/or its attorneys. The petition raises the question whether, under the Due Process Clause, Texas courts may ignore the blatant appearance of impropriety in such cases, or whether they must, at the very least, inquire into the circumstances and amounts at issue when one party questions the opposing party's and/or its lawyers' contributions to a judge sitting on the case.

INTEREST OF AMICUS CURIAE

The interest of amicus Public Citizen is set out in the accompanying motion for leave to file this brief.[1]

STATEMENT OF THE CASE

Under the Texas Constitution, all state judges are elected. The nine supreme court justices and the 79 courts of appeals justices serve six-year terms. The approximately 400 judges of the district courts and the 447 judges of the county-

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[1]Pursuant to Rule 37.6 of this Court, amicus states that no party had any role in writing this brief and that no one other than amicus or its counsel made a monetary contribution to the preparation or submission of this brief.

level courts (constitutional county courts, county courts at law, and probate courts) serve four-year terms. Tex. Const. art. 5, §§ 2, 6, 7, 15 (terms of office); www.courts.state.tx.us/public info/AR98 (number of courts).

Any "person" other than labor unions and most corporations may make financial contributions to the election campaigns of judges in Texas. Tex. Elec. Code Ann. § 253.091, § 253.094. Corporate shareholders, officers, and employees and union members are free to give on their own behalves. Prior to June 16, 1995, when what the Texas Legislature called the "Judicial Campaign Fairness Act" became effective, *see id.* § 253.151 *et seq.*, the amount a judicial candidate could accept from a contributor—including a lawyer or other person with a direct interest in a matter pending before a sitting judge running for re-election—was unlimited. Since June 1995, a judicial candidate may not accept more than $5,000 from any one person per election for a campaign for election to the supreme court, the court of criminal appeals, or a judicial office in a judicial district where the population exceeds one million. *Id.* § 253.155; *see also* http://txsos-7.sos.state.tx.us/elections/laws/populations.shtml (8 of 14 court of appeals districts have populations exceeding one million).[2] If the judicial district's population is between 250,000 and one million, the candidate may not accept more than $2,500 from one person per election. Tex. Elec. Code Ann. § 253.155. If the judicial district's population is less then 250,000, the limit is $1,000 from one person per election. *Id.*

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[2]To put that amount in perspective, it is 2½ times the amount that any individual may contribute to a candidate for president of the United States, and five times the maximum amount permitted prior to November 6, 2002. *See* 2 U.S.C. § 441a(1)(A).

The contribution limits are calculated separately for each election, not for each election cycle. Thus, a contributor may give $5,000 to a candidate for a seat on the supreme court for the primary election, $5,000 for the general election, and $5,000 for any runoff election. Tex. Ethics Comm'n Advisory Op. No. 302 (1996). The law places no limit on the total amount of contributions that an individual may make to all judicial candidates and PACs combined.

Texas law establishes separate limits for contributions from law firms and their members. After the combined contributions of the firm and its members to a single candidate for a single election reach six times the limit imposed on individuals—for example, $30,000 in the case of a statewide judicial office—a candidate may not accept contributions of more than $50 from other members of the firm for that election. 15 Tex. Elec. Code Ann. § 253.157.

Limitations on PAC contributions are calculated differently than are limitations on contributions by individuals. The Act sets voluntary expenditure limits for candidates for each judgeship, *id.* § 253.164, § 253.168, and a candidate may accept from PACs a combined total of up to 15 percent of the applicable voluntary expenditure limit. That combined total may come from one PAC or from many. For example, in the case of an election for a statewide judicial office, for which the voluntary expenditure limit is $2,000,000, one or more PACs may contribute a combined total of up to $300,000 per candidate. *Id.* § 253.160.

If a candidate does not abide by the applicable voluntary expenditure limit, the contribution limits are suspended for that candidate's opponents. *Id.* § 253.165. Thus, for example, if a challenger chooses not to abide by the voluntary limit, the

incumbent candidate may accept unlimited contributions from any person or law firm, even one with a case pending in his or her court.

Contributions by litigants or lawyers to the judicial candidacy of judges before whom they have matters pending are not subject to any additional prohibition or limitation. In fact, as noted in a 1999 report prepared for the Supreme Court of Texas, "nothing in the Act would bar a judge who has accepted an excessive, illegal contribution to preside over a case involving the contributor." Supreme Court of Texas, Judicial Campaign Finance Study Committee, Report and Recommendations, at 18 (Feb. 23, 1999).

Judicial candidates may begin campaign solicitations approximately seven months (210 days) before the January 2 deadline for filing an application to be placed on the ballot and for approximately four months (120 days) after the last election (primary, runoff, or general) in which the candidate has an opponent. 15 Tex. Elec. Code Ann. § 253.153(a); *id.* § 172.023(a). Thus, a sitting judge may solicit contributions for 21 months (seven months before filing deadline, ten months from deadline through general election, four months after general election) of each four- or six-year term.

Canon 2 of the Texas Code of Judicial Conduct requires each judge to "avoid[] impropriety and the appearance of impropriety in all of the judge's activities." Notwithstanding this general admonition, the Texas Code omits Canon 5(C)(2) of the ABA Model Code of Judicial Conduct, which prohibits candidates from personally soliciting or accepting campaign funds and requires that a campaign committee perform those tasks. As a result, Texas is one of only four states in which judges may personally solicit campaign contributions. ABA,

Report and Recommendations of the Task Force on Lawyers' Political Contributions, Part Two at 40-41 n.73 (July 1998). In fact, Canon 4D(1) of the Texas Code of Judicial Conduct expressly permits judges and candidates for judicial office personally to solicit funds for their campaigns for judicial office, with no prohibition or limitation on soliciting from people who have current business before them or who are likely to come before them if they become judges.

Not surprisingly, individuals and groups with substantial interests in litigation, including lawyers, businesses, and groups with a significant number of cases pending before the courts, regularly contribute large amounts of money to judges and candidates for judicial office. For example, the parties and lawyers involved in the nine cases heard by the Texas Supreme Court in March 2002 had contributed $972,133 to the nine justices. The parties and lawyers involved in the nine cases heard in April 2002 had contributed $810,796 to the justices. Texans For Public Justice, Dollar Docket (April 17, 2002; May 22, 2002) (available www.tpj.org). Petitioner informs us that, according to the contribution reports on file with the Texas Ethics Commission, the two court of appeals justices who ruled against her accepted contributions from lawyers representing her opponents in amounts totaling from $300 to $2,550 in 1991, 1996, and 2000.[3]

Moreover, lawyers and law firms accounted for 50 percent or more of the contributions received by each of the four supreme court justices who ran in 1998. Texans For Public

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[3]Copies of Justice Vance's 2000 reports are available at www.ethics.state.tx.us/whatsnew/srchinfo. His earlier reports and Justice Davis's reports are available from the offices of the Texas Ethics Commission in Austin. *See* Pet. at 6 n.2, 7 n.3, & 8 n.4.

Justice, Checks & Imbalances: How the Texas Supreme Court Raised $11 Million, Part VI at I-2 (April 11, 2000) (available www.tpj.org). Business and PAC contributions accounted for another 15 to 17 percent of the money raised by each candidate. *Id.* Three of the justices faced no serious opposition in the primary, and each raised many times the amount raised by his or her general election opponent. *Id.* (Part IV at 2). One justice raised 82 percent of a total $1,153,747 from lawyers, businesses, and PACs and raised 68 times as much money as his general election opponent. *Id.*

As these figures suggest, the huge amounts of money collected by judicial candidates cannot be dismissed as necessary to pay for the costs of campaigning. In fact, the absence of a strong opponent does not seem to correlate with decreased fundraising. For instance, in the 1997-98 election cycle, three incumbent supreme court justices ran in primaries that were uncontested or practically uncontested (one challenger raised $134). These incumbents raised 7.6 to 68 times the amounts raised by their general election opponents, Checks & Imbalances, *supra*, Part IV at 2, and each won easily. *See* http:/204.65.104.19/elchist.exe (results posted by Secretary of State). In the 1995-96 election cycle, the four incumbent justices running for re-election each ran in uncontested primaries and raised between 14 and 1,425 times what their main general election opponents had to spend. Texans for Public Justice, Payola Justice: How Texas Supreme Court Justices Raise Money From Court Litigants at 25 (Feb. 1998) (available at www.tpj.org).

Because lawyers and political action committees whose constituents regularly appear before the courts are major contributors to Texas judicial campaigns, individuals such as Petitioner are often forced to litigate before judges who have

accepted contributions from the opposing side. Although Texas Rule of Civil Procedure 18b and Texas Rule of Appellate Procedure 15a require recusal when a judge's "impartiality might reasonably be questioned," under Texas case law, a judge need not disqualify him or herself from a case where one party or its lawyer has been a contributor to the judge's election campaign, no matter how recent or large that person's contribution, alone or in combination with the contributions of others with similar interests in the outcome of the case. Indeed, motions to recuse a judge based on campaign contributions of an opposing party or counsel to the campaign of that judge have been uniformly unsuccessful. *See Apex Towing Co. v. Tolin*, 997 S.W.2d 903, 907 (Tex. 1999) (no recusal where judge received "substantial political donations from counsel and from one of the parties"); *Williams v. Viswanathan*, 65 S.W.3d 685, 689 (Tex. App. 2001) (argument that "bias is shown because appellants' opposing counsel made contributions to [judge's] campaign . . .has been rejected by the courts of this state"); *Aguilar v. Anderson*, 855 S.W.2d 799, 802 (Tex. App. 1993) (no recusal where judge solicited and lawyer contributed while case pending); *J-IV Invs. v. David Lynn Mach., Inc.*, 784 S.W.2d 106 (Tex. App. 1990) (no recusal where $500 contributed to judge after verdict but before decision on motion jnov); *Texaco, Inc. v. Pennzoil Co.*, 729 S.W.2d 768, 842 (Tex. App. 1987) (no recusal although plaintiff's counsel contributed $10,000 to trial judge soon after filing lawsuit); *River Road Neighborhood Ass'n v. South Texas Sports, Inc.*, 673 S.W.2d 952 (Tex. App. 1984) (no recusal although 21.7% of total campaign contributions of one justice came from appellee's lawyer; 17.1% of contributions to another justice came from appellee).

The Texas system for financing judicial elections undermines Texans' respect for their judicial system. A 1999

survey conducted by the Texas Office of Court Administration and the State Bar of Texas found that 83 percent of the respondents believed that campaign contributions have a "very significant" or "somewhat significant" influence on judges' decisions. Judicial Campaign Finance Study, *supra*, at 4; *see also* Column, *Texas justice for sale? Judge it yourself*, Houston Chronicle, Sept. 13, 1992, Outlook at 2 ("a fair system of justice demands not only a judiciary that is independent but also a judiciary that promotes public confidence in its independence and integrity, and both those requirements are jeopardized by a virtually unrestricted campaign finance system.").[4]

Many Texas judges agree. A study prepared by the Texas Supreme Court, the Texas State Bar, and the Texas office of Court Administration in May 1999 found that 48 percent of judges think contributions have a significant influence on decisionmaking; only 14 percent think that they have no influence. *See* Supreme Court of Texas, *et al.*, The Courts and The Legal Profession in Texas - The Insider's Perspective at 19 (May 1999) (available at http:courts.state.tx.us/publicinfo/reports.asp). Chief Justice Thomas Phillips and former-Justice, now-Attorney General John Cornyn have testified that the "appearance of impropriety" caused by multimillion dollar judicial campaigns is "a cancer" on the state judiciary. *Judges offer opposing views on campaign-donation limits*, The Dallas

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[4]A national survey reported similar findings: "A full 78 percent [of those surveyed] believe that elected judges are influenced by having to raise campaign funds." National Center for State Courts, How The Public Views The State Courts, A 1999 National Survey at 3 (May 1999). *See also* Supreme Court of Minn., 1999-2000 Public Opinion of the Courts Study, Executive Summary at 5 (68% of respondents think elected judges are influenced by having to raise campaign funds) (available at www.courts.state.mn.us).

Morning News, Mar. 2, 1995, at 29A. Indeed, Justice Phillips has repeatedly acknowledged that the existing system compromises the appearance of fairness. *See, e.g.*, Hon. Thomas Phillips, State of the Judiciary, Address to the 77th Legislature (Feb. 13, 2001) ("The current system . . . has long outlived its usefulness, and now dangerously impedes public respect for the administration of justice.") (available at www.supreme.courts. state.tx.us/Docs/state2001.htm); *Study faults justices for business ties*, The Dallas Morning News, Feb. 24, 1998 (quoting Justice Phillips as saying "I do think the system lends itself to eroding public confidence."); *see also 2 more enter race for high court, Hopefuls say public lacks confidence in justices*, Dallas Morning News, Dec. 3, 1993, at 30A (reporting statement by Judge Jimmy Carroll (then chief justice of Third Circuit Court of Appeals) that "the current system of judicial campaign finance has led to the appearance of impropriety . . . on the Texas Supreme Court.").

Judges outside the state also recognize the improper appearance created when judges accept and solicit contributions from lawyers and parties appearing before them. *See Stretton v. Disciplinary Bd.*, 944 F.2d 137, 145 (3d Cir. 1991) ("There is no aspect of the electoral system of choosing judges that has drawn more vehement and justifiable criticism than the raising of campaign funds, particularly from lawyers and litigants likely to appear before the court"); *In re Mason*, 916 F.2d 384, 387 (7th Cir. 1990) (noting "difficult case" presented if attorney gave significant financial support to judge's campaign committee while judge presided over case in which attorney was involved).

Lawyers also believe that contributions influence decision-making. A 1999 survey prepared by the Supreme Court of Texas, in conjunction with the Texas State Bar and the

Texas Office of Court Administration, showed that 79 percent of Texas lawyers think the influence is "significant." The Courts and The Legal Profession in Texas, *supra*, at 54. Only one percent think that contributions do not affect decisionmaking at all. *Id.*

Similarly, newspapers throughout Texas recognize the appearance of impropriety caused by the current system of judicial elections. *See, e.g., Camera-Shy Justices Remember Lesson Learned in 1987*, Texas Lawyer, Aug. 24, 1998 ("In 1987, [then-Justice John] Hill told [*60 Minutes*' Mike] Wallace the problem was in how the court was perceived by the public. 'They look and see amounts of money that have been given by litigants. They wonder why. They get confused. They read stories. It breaks down confidence,' Hill said. Truer words were never spoken."); Editorial, *Is justice still for sale?*, Austin-American Statesman, June 25, 1998 ("danger of corruption and favoritism at all levels of the judiciary is obvious"); Editorial, *High court contributions show reforms are needed*, San Antonio Express-News, Mar. 1, 1998 ("Judges raising money from lawyers and other parties with an interest before the court raises an appearance of impropriety. Few would disagree."); Editorial, *Not for sale*, Texarkana Gazette, Feb. 26, 1998 ("At issue is the system, not the justices themselves. . . . It's time to . . . remove the 'for sale' sign from our Supreme Court.").

REASONS FOR GRANTING THE WRIT

I. The Right To Due Process Includes The Right To A Decisionmaker Who Both Is And Appears To Be Impartial.

Parties to civil cases have a constitutional right to a fair trial. *Latiolais v. Whitley*, 93 F.3d 205, 207 (5th Cir. 1996); *Lemons v. Skidmore*, 985 F.2d 354, 357 (7th Cir. 1993); *Bailey v. Systems Innovation, Inc.*, 852 F.2d 93, 98 (3d Cir. 1988). And "[t]rial before an 'unbiased judge' is essential to due process." *Johnson v. Mississippi*, 403 U.S. 212, 216 (1971); *accord Concrete Pipe & Prods. v. Construction Laborers Pension Trust*, 508 U.S. 602, 617 (1993) ("due process requires a 'neutral and detached judge in the first instance'") (citation omitted). As this Court has observed:

> The requirement of neutrality in adjudicative proceedings safeguards the two central concerns of procedural due process, the prevention of unjustified or mistaken deprivations and the promotion of participation and dialogue by affected individuals in the decisionmaking process. *See Carey v. Piphus*, 435 U.S. 247 (1978). The neutrality requirement helps to guarantee that life, liberty, or property will not be taken on the basis of an erroneous or distorted conception of the facts or the law. *See Mathews v. Eldridge*, 424 U.S. 319 (1976). At the same time, it preserves both the appearance and reality of fairness, "generating the feeling, so important to a popular government, that justice has been done," *Joint Anti-Fascist Committee v. McGrath*, 341 U.S. 123, 172

> (1951) (Frankfurter, J., concurring), by ensuring that no person will be deprived of his interests in the absence of a proceeding in which he may present his case with assurance that the arbiter is not predisposed to find against him.

Marshall v. Jerrico, Inc., 446 U.S. 238, 242 (1980).

Moreover, "justice must satisfy the appearance of justice." *Offutt v. United States*, 348 U.S. 11, 14 (1954). "[T]his stringent rule may sometimes bar trial [even] by judges who have no actual bias and who would do their very best to weigh the scales of justice equally between contending parties." *Concrete Pipe & Prods.*, 508 U.S. at 618 (citing *Marshall v. Jerrico*, 446 U.S. at 243).[5] The Due Process Clause forbids even the "possible temptation to the average man as judge" not to be neutral and detached. *Id.* at 617 (quoting *Ward v. Village of Monroeville*, 409 U.S. 57, 60 (1972)). Thus, in *Tumey v. Ohio*, 273 U.S. 510 (1927), this Court reversed a conviction in a case adjudicated by a town mayor who was paid for his service as a judge from fines he assessed when acting in a judicial capacity, although no showing of actual bias was made.

"[T]he [judge's] financial stake need not be as direct or positive as it appeared to be in *Tumey*." *Gibson v. Berryhill*, 411 U.S. 564, 579 (1973). For example, in *Ward v. Village of Monroeville*, the Court invalidated a scheme whereby a mayor

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[5] *Cf. United States v. Jordan*, 49 F.3d 152, 155 (5th Cir. 1995) (standard for recusal under 28 U.S.C. § 455(a) is whether "reasonable and objective person, knowing all of the facts, would harbor doubts concerning the judge's impartiality"; goal "is to avoid even the appearance of partiality") (citing *Liljeberg v. Health Servs. Acquisition Corp.*, 486 U.S. 847, 860-61 (1988)).

who was responsible for revenue production also adjudicated traffic and ordinance violations. The fines and other money derived from proceedings in the mayor's court accounted for a substantial portion of the village's revenues, although the mayor's salary was not directly affected by that money. 409 U.S. at 58-59. The Court concluded that a "possible temptation" exists "when the mayor's executive responsibilities for village finances may make him partisan to maintain the high level of contribution from the mayor's court." *Id.* at 60; *see also Gibson v. Berryhill*, 411 U.S. at 579 (administrative board composed of optometrists could not preside over hearing against competing optometrists); *Marshall v. Jerrico*, 446 U.S. at 243 & n.2 (citing cases); *cf. Buckley v. Valeo*, 424 U.S. 1, 27 (1976) ("Of almost equal concern as the danger of actual quid pro quo arrangements is the impact of the appearance of corruption stemming from public awareness of the opportunities for abuse inherent in a regime of large individual financial contributions.").

Justice O'Connor has raised the question whether "the very practice of electing judges undermines" the interest in a judiciary that both is and appears to be impartial, and she has emphasized that the need to raise substantial funds to campaign for judicial office exacerbates this problem. *Republican Party of Minnesota v. White*, __ U.S. __, 122 S. Ct. 2528, 2542 (2002). "[R]elying on campaign donations may leave judges feeling indebted to certain parties or interest groups." *Id.* And "[e]ven if judges were able to refrain from favoring donors, the mere possibility that judges' decisions may be motivated by the desire to repay campaign contributors is likely to undermine the public's confidence in the judiciary." *Id.* at 2543. Numerous surveys manifest the truth of those observations. *See id.* (citing surveys); *see also* studies cited *supra* p. 8 & n.4. In light of such facts, the principles articulated in this Court's opinions

compel the conclusion that the Texas system—and in particular the Texas courts' rulings that contributions never warrant recusal—engenders due process violations.

Petitioner's case exemplifies the constitutional risk of allowing interested parties to finance expensive judicial campaigns. Whether or not judicial decisions in Texas are in fact affected by a party's or lawyer's contribution to the judge's campaign, Ms. Walston can have no faith that the outcome of her case was not affected by the contributions to the judges who ruled against her. Indeed, the appearance of partiality in this case—where the judges ruled in favor of lawyers and a law firm that had made repeated contributions to them, and where the judges depend on campaign contributions to obtain and retain their jobs—is stronger and the connection between the money and the appearance more direct than in *Ward*.[6]

II. The States Are In Conflict Over The Standard To Be Applied Under The Due Process Clause When A Judge Presides Over A Case In Which He Or She Has Received Substantial Campaign Contributions From Interested Parties.

Texas courts have repeatedly rejected the argument that acceptance of campaign contributions from a party or its lawyer constitutes a due process violation or provides grounds for recusal. *See* cases cited *supra* p. 7. Other state high courts, however, have reached different conclusions. And although

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[6]The appearance of impropriety may be especially pernicious here, where the court of appeals ruled against Petitioner in an order that provided no reasons for the decision, thereby insulating the decision from objective public assessment and, as a practical matter, from further judicial review.

some of the cases base their holdings on state-law canons, rather than due process analysis, due process considerations, including the right to an impartial judicial decisionmaker, are at the heart of each decision.

For example, in sharp contrast with the Texas courts, the Oklahoma Supreme Court recognizes that "due process must include the right to a trial without the appearance of judge partiality arising from counsel's campaign contribution on behalf of a judge during a case pending before that judge." *Pierce v. Pierce*, 39 P.3d 791, 799 (Okla. 2001). Although in Oklahoma a "lawyer's contribution to a judge's campaign does not *per se* require that judge's disqualification when the lawyer comes before him," due process may require disqualification in an individual case. *Id.* at 798 (disqualification required when a lawyer made maximum campaign contribution allowed by statute, member of lawyer's immediate family contributed, and lawyer solicited contributions for judge's campaign). *Cf. In re Disqualification of Ney*, 657 N.E.2d 1367, 1368 (Ohio 1995) (disqualification involving campaign issues is "decided on a case-by-case basis").

The Florida Supreme Court has held that receipt of legal campaign contributions from parties or their lawyers does not itself require disqualification, although disqualification may be warranted if an additional factor is present, such as the party's lawyer serving as chair of the judge's campaign. *MacKenzie v. Super Kids Bargain Store*, 565 So.2d 1332, 1338 & n.5 (Fla. 1990) ($500 contribution to judicial campaign of judge's spouse does not warrant disqualification).

Similarly, in Washington, North Dakota, and West Virginia, "[a]lthough campaign contributions of which a judge has knowledge are not prohibited, these contributions may be

relevant to recusal" or disqualification. Wash. Code of Jud. Conduct, comment to Canon 7(b)(2); N.D. Code of Jud. Conduct, comment to Canon 5(C)(2); W. Va. Code of Jud. Conduct, comment to Canon 5(C)(2).

Nevada's practice is closer to that of Texas, although still not as absolute. On the one hand, the Nevada Supreme Court has held open the possibility that contributions could warrant disqualification: "In the context of campaign contributions . . . a contribution to a presiding judge by a party or an attorney does not *ordinarily* constitute grounds for disqualification." *City of Las Vegas Downtown Redevelopment Agency v. Eighth Judicial District Court*, 5 P.3d 1059 (Nev. 2000) (emphasis added, citation omitted). On the other hand, the Nevada court has held that disqualification was not only not required but *improper* when parties on one side of a case gave four donations to the presiding judge, ranging from $150 to $2,000. *Id.*; *see also* Nevada Code of Jud. Conduct, comment to Canon 3(e)(1) ("mere receipt of a campaign contribution from a witness, litigant, or lawyer involved with a proceeding is not grounds for disqualification").

In Alabama, recusal is required where judicial campaign contributions create an "appearance of impropriety." Ala. Stat. § 12-24-1. *See also* Ala. Stat. § 12-24-2(a), (b) (parties and lawyers required to submit disclosure certificates stating amount of contribution to assigned judge(s) within 28 days of notice of appeal or of notice of assignment of judge; recusal required on request of party if opposing party or opposing counsel (not aggregated) contributed more than $4,000 to supreme court justice or court of appeals judge or more than $2,000 to circuit court judge).

Thus, the states disagree on the extent to which campaign contributions from parties and lawyers on one side of a case implicate the due process rights of the opposing party, and only Texas takes the view that contributions can never create an unconstitutional appearance of impropriety, warranting disqualification. The Court should grant the petition to overturn Texas's refusal to consider campaign contributions as a basis for recusal and to provide guidance to the courts of the 31 states that elect some or all of their judges.

III. Petitioner Adequately Preserved The Question Presented.

Until she lost her case in the court of appeals, Petitioner had no cause to question the impartiality of the justices hearing her case. She learned for the first time that two of the three court of appeals justices who decided her case had accepted campaign contributions from the lawyers representing her adversary only *after* her petition for review before the Texas Supreme Court was denied. Pet. 3-4; Pet. App. 39. Therefore, she did not have an opportunity to move for recusal of the two court of appeals justices. After she learned the pertinent facts, Petitioner raised the issue in her motion for rehearing before the Texas Supreme Court. Although she did not use the words "due process," she expressly questioned the justices' partiality and doubted that she had received a fair hearing. Pet. App. 36 ("the judgment of the Tenth Court of Appeals may have been tainted by partiality on the part of the majority justices"); *id.* at 39 (contributions from individuals who profited from sale at issue in case and dissent by justice who did not receive contributions from interested parties contribute to "appearance that the judgment may be the result of improper consideration by the court.")

Throughout this litigation, Petitioner has acted *pro se*. Thus, although her presentation of the issue in the Texas Supreme Court could have been more artfully stated, her discussion is adequate to preserve the issue for this Court's review. As the Court has observed, "a *pro se* complaint 'however inartfully pleaded,' must be held 'to less stringent standards than formal pleadings drafted by lawyers' . . . ." *Hughes v. Rowe*, 449 U.S. 5, 10 n.7 (1980) (quoting *Haines v. Kerner*, 404 U.S. 519, 520 (1972)). Moreover, the need for leniency in considering *pro se* cases extends to preservation of issues. "In other words, a court of appeals may require less precision in the presentation of the issue to the lower court than it demands of a litigant represented by counsel." *Forshey v. Principi*, 284 F.3d 1335, 1357 (Fed. Cir. 2002). These considerations have particular force here, where, given the unwavering decisions of the Texas courts refusing to consider campaign contributions to judges as a basis for recusal, Petitioner's statement would have been summarily rejected under Texas law even if she had made it more clearly.

The "general rule that issues must be raised in lower courts in order to be preserved as potential grounds of decision in higher courts . . . does not demand the incantation of particular words; rather, it requires that the lower court be fairly put on notice as to the substance of the issue." *Nelson v. Adams*, 529 U.S. 460, 469 (2000) (citing *Beech Aircraft Corp. v. Rainey*, 488 U.S. 153, 174-75 (1988)). Petitioner's *pro se* papers satisfy this rule.

CONCLUSION

The petition should be granted.

Respectfully submitted,

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